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No. 83-494

In the Supreme Court of the United States

OCTOBER TERM, 1983

LLOYD CHRIS WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the delay between petitioner's arrest on state charges and his indictment and trial in the district court deprived him of a Sixth Amendment right to a speedy trial or of due process under the Fifth Amendment.

2. Whether the district court erred in admitting extrinsic act evidence explaining why petitioner was approached to murder a federal grand jury witness.

3. Whether the district court erred in refusing to suppress defendant's false exculpatory statement made in a conversation initiated by him after he had been given *Miranda* warnings.

4. Whether the district court erred in charging the jury that they were entitled to consider petitioner's "keen personal interest" in the outcome of the trial in assessing the credibility of his testimony.

5. Whether petitioner was entitled to credit on his life sentence for pretrial state incarceration.

6. Whether petitioner could properly be convicted of conspiring to deprive a federal grand jury witness of the "free exercise or enjoyment" of the right to testify before a federal grand jury where the witness was testifying under compulsion.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 710 F.2d 1062.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1983. The petition for a writ of certiorari was filed on September 9, 1983. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).[1]

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of conspiring to kill a federal grand jury witness in order to prevent the witness from testifying, in violation of 18 U.S.C.

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[1]Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. 1251 (see Pet. 2), but that provision is plainly inapplicable.

241.[2] The conspiracy resulted in the death of two innocent bystanders who were struck by a bullet fired at the witness. Petitioner was sentenced to imprisonment for life. The court of appeals affirmed his conviction (Pet. App. 1a-18a).

1. According to the evidence at trial, petitioner conspired with Boyce Wayne Rummell to murder Michael Overstreet in order to prevent Overstreet from implicating Rummell in a drug smuggling scheme in upcoming testimony before a federal grand jury. According to Rummell's testimony, he decided to hire someone to kill Overstreet, and telephoned petitioner. Petitioner previously had bragged to Rummell about serving as an enforcer for drug dealers, had assisted Rummell in a situation involving repossession of a pickup truck, and had offered to "help" Rummell in connection with a problem he was experiencing with a "gentleman that was going to testify against a group of people." Pet. App. 3a-4a.

In response to Rummell's telephone request for assistance, petitioner traveled by privately chartered airplane to Hidalgo County, Texas, early on the morning of July 13, 1980. Rummell met petitioner at the airport and agreed to pay petitioner $10,000 to kill Overstreet. After locating Overstreet at Pepe's Bar in Hidalgo County later that day, and watching him for several hours, petitioner fired one

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[2] 18 U.S.C. 241 provides in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;
>
> * * * * *
>
> They shall be fined no more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

shot into the bar from a pickup truck driven by Rummell. A young man and a young woman were killed by the bullet meant for Overstreet. Pet. App. 1a-5a; Tr. 265, 324-336, 348-352, 358-360, 360-369, 371-376.[3]

2. State charges of conspiracy to murder and murder, arising from the shooting at Pepe's Bar, were initially lodged against Rummell. As part of a plea bargain in connection with those charges, Rummell identified petitioner as the man he had hired to kill Overstreet. In exchange for his guilty plea to charges under 18 U.S.C. 241, entered in federal court, the state capital murder charges against Rummel were dismissed.[4] As a result of Rummell's identification of petitioner, state prosecutors had him arrested on July 20, 1981. The state charged petitioner with conspiracy and murder.

Petitioner was arrested in New Mexico by state authorities on a Texas warrant. The arresting officers advised petitioner of his rights, as required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Petitioner stated that he understood those rights. While his personal history was being taken at the police station, petitioner asked, "What in the hell is going on here?" The officer taking his history told him that he was charged with murder in Texas and asked if he knew one of the deceased victims and if he knew Boyce Rummell. Petitioner denied knowing either. The officer then said that was all he knew about the case. Pet. App. 14a; Tr. 118-119, 128, 133, 136, 138-139.

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[3]Petitioner testified at trial that he was present with Rummell at the time of the shooting and acknowledged that he fled from the scene with Rummell. He claimed, however, that Rummell fired the shot and that he had met with Rummell only to complete a drug transaction. Petitioner denied knowledge of and involvement in any conspiracy to kill or intimidate Overstreet. Pet. App. 2a, Tr. 675, 689-693, 698-699.

[4]Rummell received a federal sentence of 40 years' imprisonment.

Petitioner was held in state custody from the time of his arrest (July 1981) until March 1982, as state prosecutors sought to bring him to trial. When it appeared that the state charges against petitioner were in danger of being dismissed, federal prosecutors, who had originally referred the matter to their state counterparts, obtained an indictment charging petitioner with violation of 18 U.S.C. 241. Petitioner was taken into federal custody on March 31, 1982, and the state abandoned its efforts to try him.

In federal court, petitioner moved to suppress his post-arrest statement that he did not know Rummell. The officer who was present testified that petitioner had not requested an attorney prior to this conversation. Petitioner testified that at some point between his arrest and the time he was placed in jail he "probably told [the officers] that [he] was going to need a good lawyer." The district court denied the motion to suppress without opinion, and the government ultimately introduced petitioner's denial that he knew Rummell as a false exculpatory statement. Pet. App. 14a-15a.

Rummell testified at trial that he decided to approach petitioner to kill Overstreet because he needed someone knowledgeable about such things and thought that petitioner would assist him. On cross-examination petitioner elicited Rummell's acknowledgment that he did not tell defendant during their telephone conversation that he wanted petitioner to kill Overstreet. Rummell was then asked on redirect why he had called petitioner for assistance in the murder. Rummell answered initially that he had contacted petitioner based on his "reputation." Petitioner's objection to this testimony was sustained. Over objection, Rummell was then permitted to testify regarding petitioner's specific acts and statements that had led him to believe that petitioner would be ready and willing to kill for money. Rummell testified that, on a prior occasion, petitioner had

accompanied him and an associate when they went to reclaim a pickup truck that had been borrowed from the associate. Petitioner, who was armed, went along to act as "insurance" or "protection." On that occasion, Rummell told petitioner that he was having a problem with a "gentleman that was going to testify against a group of people." Petitioner said "that if [Rummell] needed any help, to let him know." In this connection, Rummell also testified that petitioner had claimed to have killed quite a few people in Viet Nam. Petitioner had also told Rummell that he had performed "services for drug dealers * * * of a violent nature" including "shooting a gentleman in both knees or something * * * to induce him to pay some money that was owed on a drug deal." Pet. App. 3a-5a.

3. The court of appeals affirmed petitioner's conviction (Pet. App. 1a-18a). The court ruled that, given petitioner's cross-examination of Rummell disclosing the absence during their initial phone conversation of any express agreement by petitioner to kill Overstreet, the district court properly allowed Rummell to testify on redirect examination concerning his prior contacts with petitioner for the purpose of demonstrating that petitioner must have understood the nature of the assistance Rummell sought (Pet. App. 7a-10a). The court concluded that the probative value of that testimony outweighed any prejudicial potential it may have carried (Pet. App. 10a-11a).

The court of appeals likewise found no error in admission of petitioner's false exculpatory statement made to the booking officer in New Mexico. The court determined that petitioner did not invoke his right to counsel after the *Miranda* warnings were given and observed that the exchange with the officer, initiated by petitioner, was "not

designed to elicit incriminating information" (Pet. App. 15a).[5]

The court held that no violation of petitioner's Sixth Amendment right to a speedy trial or of his Fifth Amendment right to due process resulted from either the eight-month period while petitioner was in state custody or the 72-day period between federal indictment and trial (Pet. App. 11a-14a). Nor did the court find any basis for petitioner's claim that he was entitled to credit on his federal sentence for time served in state pretrial detention (Pet. App. 16a-17a). The court concluded that while state and federal prosecutors had worked together closely in investigating the murders, the United States did not originally intend to obtain a federal indictment against petitioner. Thus, the time spent in state custody was not the functional equivalent of federal custody for the conspiracy violation (*ibid.*).

The court found "little merit" to petitioner's contention that he could not be guilty of conspiring to intimidate Overstreet in the "free exercise" of his right to testify simply because Overstreet was testifying under legal compulsion (Pet. App. 17a-18a). Finally, the court found no error in a jury charge that noted petitioner's "keen personal interest" in the case, observing that the jury was also cautioned to weigh the testimony of co-conspirator Rummell with great care (Pet. App. 15a-16a).

ARGUMENT

The court of appeals' careful opinion addresses each of the six issues raised by the petition. Petitioner has not demonstrated any error in the court of appeals' resolution of these issues and has demonstrated no other basis for further review.

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[5]The court also observed that any error in admission of this statement was harmless (Pet. App. 15a).

1. Petitioner claims (Pet. 7-15) that his Sixth Amendment right to a speedy trial attached at the time of his state arrest and that the court of appeals erroneously excluded from consideration the eight-month period during which he was in state custody prior to the return of the federal indictment in rejecting his Sixth Amendment claim. But the protection of the Sixth Amendment extends only to persons formally "accused" by arrest or indictment (*United States* v. *MacDonald*, 456 U.S. 1, 6-7 (1982)), and petitioner plainly had neither been arrested nor indicted prior to March 29, 1982, on the federal charge upon which he ultimately was tried. Petitioner was promptly tried thereafter. His trial was originally set for June 1, 1982, and was postponed at petitioner's request until June 9, 1982 (R. 189-192).[6]

Petitioner argues that he should be deemed to have been "accused" by the United States upon the initiation of state proceedings because federal prosecutors referred the case to state prosecutors and because of alleged "court shopping" by federal prosecutors (Pet. 7, 10-12). However, the court of appeals determined that the evidence supported the United States' representation that it initially had no intention to charge petitioner with any federal offense and only did so after the state prosecution appeared to be floundering (Pet. App. 12a). This is essentially a factual determination that does not warrant further review by this Court. In any event, petitioner concedes (Pet. 11) that the United States did not originally intend to prosecute him.

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[6]Petitioner does not appear to contend, and did not contend below (see Pet. App. 12a), that the 72 days elapsed between his federal indictment and trial violated his Sixth Amendment rights.

Petitioner cites no authority for the contention that his rights were violated because federal prosecutors encouraged the state prosecution. Petitioner's admission that federal officials were primarily interested in his state prosecution demonstrates that those proceedings were not a pretext to restrain petitioner until such time as federal authorities decided to prosecute. State arrest does not constitute a federal "accusation" for purposes of the Sixth Amendment in such circumstances. See *United States* v. *Cordova*, 537 F.2d 1073, 1075-1076 (9th Cir.), cert. denied, 429 U.S. 960 (1976); *United States* v. *DeTienne*, 468 F.2d 151, 155 (7th Cir. 1972), cert. denied, 410 U.S. 911 (1973); *United States* v. *Brown*, 605 F.2d 389, 395 (8th Cir.), cert. denied, 444 U.S. 972 (1979); *United States* v. *Romero*, 585 F.2d 391, 398 (9th Cir. 1978), cert. denied, 440 U.S. 935 (1979); see also *United States* v. *MacDonald*, 456 U.S. at 10 n.11.

Mindful of this Court's admonition that the "Due Process Clause has a limited role to play in protecting against oppressive delay" (*United States* v. *Lovasco*, 431 U.S. 783, 789 (1977)), the court of appeals properly held that the time elapsed prior to petitioner's federal indictment entailed no violation of the Fifth Amendment. As the court below recognized, the United States demonstrated an adequate and proper reason for the delay between the offense and petitioner's trial — the government's decision to defer to state prosecution. Petitioner wholly failed to show any "actual prejudice to the conduct of the defense" or intentional delay by the government to gain some tactical advantage (Pet. App. 13a). Compare *United States* v. *Marion*, *supra*, 404 U.S. 307, 325 (1971).

2. Petitioner contends (Pet. 15-21) that admission in evidence of Rummell's testimony concerning petitioner's claims to have committed violent acts in the past and concerning petitioner's prior service to Rummell as an "enforcer" was

improper under Fed. R. Evid. 404(b). That provision prohibits introduction of evidence of "other wrongs" to prove a defendant's bad character or propensity to commit acts such as those constituting the offense charged. However, such evidence may be admitted under the Rule if relevant to prove a fact other than character, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Admissibility of "bad acts" evidence is also subject to the generic requirement of Fed. R. Evid. 403, that probative value not be substantially outweighed by the danger of unfair prejudice. The court of appeals' application of these rules to the facts of this case is entirely fact-bou d and thus does not warrant further review; it is in any event correct.

The testimony at issue was adduced upon the government's redirect examination of Rummell after petitioner's cross-examination of Rummell raised doubt as to whether petitioner knowingly agreed to join the conspiracy to kill a federal grand jury witness (Pet. 10a). The disputed evidence thus became relevant to the issues of knowledge and agreement (*ibid.*). In the circumstances, the court of appeals properly concluded that the probative value of the incident in which petitioner had provided armed "protection" to Rummell in repossessing a pickup truck outweighed whatever prejudice might have flowed from introduction of this evidence. Indeed, petitioner protests (Pet. 18) that, in the particular circumstances described, his participation in this incident would not necessarily be perceived as reflecting a propensity for use of excessive force.

Rummell was also allowed to testify on redirect that he sought out petitioner to carry out the murder based upon petitioner's prior statement of willingness to be of assistance in the matter of a witness who was giving Rummell a "problem," and petitioner's statements indicating that he had killed in the Viet Nam war, was not opposed to killing

again, and had performed services of a violent nature for drug dealers, including a "kneecapping". The relevance of this testimony does not depend on the jury's believing that petitioner actually committed such acts but only that, having thus bragged to Rummell, he would have understood that Rummell's telephone request for assistance required some violent act (Pet. App. 11a).[7] While the court of appeals was somewhat more troubled by the prejudicial potential of this portion of the challenged testimony, the court properly upheld its admission, on the ground that the testimony was introduced only to show that statements were made and because, although entitled to a jury instruction restricting consideration of this testimony to proper purposes, petitioner did not request one (Pet. 11a). As the court of appeals observed (Pet. App. 10a), in assessing petitioner's alibi (see page 3 note 3, *supra*), it was important to determine whether petitioner understood the nature of Rummell's request prior to arriving in Hidalgo County (Pet. App. 10a). The disputed testimony was accordingly highly relevant. Petitioner therefore cannot establish that unfair prejudice outweighs the probative value of the disputed testimony.[8]

3. Petitioner next contends (Pet. 21-23) that the district court improperly admitted his statement, made during booking procedures, denying that he knew Boyce Rummell. Petitioner correctly states (Pet. 21) the rule established by this Court in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), *i.e.*, that an accused who has been given his *Miranda* warnings

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[7]The cases cited by petitioner (Pet. 18-19) are inapposite because petitioner's statements that he had killed or maimed were not introduced to show that he had actually done so and thus had a propensity to do so again.

[8]We note that the prosecutor emphasized in closing argument that the testimony was important only as evidence of petitioner's joinder in the conspiracy (Tr. 836).

and has expressed a desire to have counsel present may not be questioned further until counsel is provided, unless the accused initiates any further conversation. Petitioner fails, however, to establish the factual predicate for application of that rule.

The court of appeals properly concluded that the evidence at the suppression hearing demonstrated that petitioner did not request appointment of counsel between the time he acknowledged understanding the *Miranda* warnings and the conversation with the booking officer during which he denied knowing Rummell (Pet. App. 15a). See pages 3-4, *supra*. Because petitioner had not invoked his right to counsel, any interrogation that followed did not violate petitioner's constitutional rights. In any event, even "indulg[ing] in every reasonable presumption against waiver" (*Brewer* v. *Williams*, 430 U.S. 387, 404 (1977)), and viewing petitioner's testimony concerning invocation of his right to counsel in the light most favorable to his claim, it is clear that the subsequent conversation was initiated by petitioner's question, "[w]hat in the hell is going on here?" And as the court of appeals concluded, the evidence demonstrated that the exchange that followed was not intended as interrogation (Pet. App. 15a). Rather, the police officer's very limited remarks to petitioner were responsive to petitioner's question. No *Miranda* violation may be found in these circumstances. See *Oregon* v. *Bradshaw*, No. 81-1857 (June 23, 1983). In any event, the court of appeals properly held (Pet. App. 15a) that, even if admission of the statement were error, its admission was, in the context of the evidence against petitioner, harmless.

4. Petitioner's remaining contentions require little discussion. First, there is no merit to the argument (Pet. 29) that, because Overstreet was slated to testify pursuant to subpoena, petitioner's actions do not support conviction under 18 U.S.C. 241 for conspiracy to intimidate Overstreet

in the "free exercise" of his constitutional rights. As the court of appeals recognized (Pet. App. 18a), petitioner's interpretation of the statute would remove its protections from the majority of witnesses whom the statute was designed to protect; few witnesses appear before grand juries on a wholly voluntary basis. And even where testimony is given under compulsion of law, oppression of persons because of the *content* of their remarks in the discharge of the civic duty to provide evidence is assuredly inconsistent with free exercise of constitutional rights. In any event, the very legislative history cited by petitioner (Pet. 29) clearly reflects that the statute was intended to protect persons fulfilling legal duties as well as those exercising privileges.

Second, the court of appeals correctly held that there was no error in the district court's instruction to the jury that petitioner's "keen interest" in the verdict could be taken into account in assessing his credibility (Pet. App. 15a-16a). In arguing (Pet. 24) that Rummell, the principal witness against him, had as great, if not a greater, stake in the proceedings, petitioner disregards the district court's instruction directing that the testimony of an accomplice be received with caution and weighed with great care. The court of appeals emphasized this balancing instruction in upholding the jury charge viewed as a whole (Pet. App. 16a). The court of appeals' ruling does not conflict with any decision of this Court or any other court of appeals.[9]

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[9]Instructions similar to those given in this case routinely have been approved in other circuits, even in the cases cited by petitioner (Pet. 23-24). See, *e.g.*, *United States* v. *Martin*, 525 F.2d 703, 706-707 (2d Cir.), cert. denied, 423 U.S. 1035 (1975); *United States* v. *Hill*, 470 F.2d 361, 363-364 (D.C. Cir. 1972). While the Seventh and Eighth Circuits have expressed a preference for general instructions on witness credibility that include passing reference to the defendant, *United States* v. *Saletko*, 452 F.2d 193, 197-198 (7th Cir. 1971), cert. denied, 405 U.S. 1040 (1972); *United States* v. *Long*, 449 F.2d 288, 298-299 (8th Cir.

Finally, the court of appeals correctly held that petitioner was not entitled, under 18 U.S.C. 3568,[10] to credit on his federal sentence for time spent in state custody prior to federal indictment (Pet. App. 16a-17a). Such credit is allowed only where "continued State confinement was exclusively the product of such action by federal law-enforcement officials as to justify treating the State jail as the practical equivalent of a Federal one" (*Ballard* v. *Blackwell*, 449 F.2d 868, 869 (5th Cir. 1971)).[11] Here, as petitioner concedes (Pet. 11), there was neither a federal indictment nor any intention to seek one during the bulk of the period of state custody. Neither court below found support for petitioner's factual contention (Pet. 25-28) that federal and state cooperation, either in his own case or that of Boyce Wayne Rummell, was such as might render state custody the "functional equivalent" of federal custody for purposes of 18 U.S.C. 3568. Accordingly, there is no occasion to review the ruling below holding that statute inapplicable.

1971), cert. denied, 405 U.S. 974 (1972); *Taylor* v. *United States*, 390 F.2d 278 (8th Cir.), cert. denied, 393 U.S. 869 (1968), in none of these cases did the court find reversible error in the use of an instruction such as was given here where the charge as a whole was not unfairly prejudicial.

[10]18 U.S.C. 3568 provides, in relevant part,

> The Attorney General shall give any * * * person [convicted of an offense] credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed.

[11]Petitioner cites no contrary authority, and we know of none.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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